Supreme Court, U.S.
FILED
JUN - 4 2010
OFFICE OF THE CLERK

No. 09-1365

In the Supreme Court of the United States

IRA ISAACS, DBA STOLEN CAR FILMS, DBA LA MEDIA,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITIONER'S REPLY BRIEF

ROGER JON DIAMOND
Counsel of Record
2115 Main Street
Santa Monica, CA 90405
Phone: 310/399-3259
RogDiamond@aol.com

Attorney for Petitioner

June, 2010

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

PETITIONER'S REPLY BRIEF 1

A. DISCUSSION OF RENICO v. LETT MAY 3, 2010) 1

B. DISCUSSION OF U.S. v. SARTORI 3

CONCLUSION 5

TABLE OF AUTHORITIES
FEDERAL CASES

Cases

Liljeberg v. Health Services Acquisition Corp.,
486 U.S. 847(1988) 6

Renico v. Lett, _____ U.S. _____,
No. 09-338 (May 2010) 1, 2, 3, 6

United States v. Jaramillo,
745 F.2d 1245 (9th Cir. 1984), cert.den.,
471 U.S. 1066, 85 L.Ed.2d 499 (1985) 3, 4, 5

United States v. Jorn, 400 U.S.470(1971) 3

United States v. Sartori, 730 F.2d 973
(4th Cir. 1984) 3, 4, 5

Statutes

28 U.S.C.§2254(a)(1) 2
28 U.S.C.§2254(d) 2

PETITIONER'S REPLY BRIEF

A. DISCUSSION OF RENICO v. LETT (MAY 3, 2010)

Petitioner filed his Petition on May 3, 2010 and the Acting Solicitor General filed the Government's Brief in Opposition on May 28, 2010, 13 days ahead of its June 10, 2010 deadline in order to make the June 8, 2010 distribution date. This reduced Petitioner's preparation time because of the intervening three day Memorial Day Weekend. Hopefully the decision to grant or deny certiorari will not be affected by the timing of the Government's response.

This case involves the Double Jeopardy Clause of the Fifth Amendment, which coincidentally was the subject of this Court's 6 to 3 decision filed on the **SAME DAY** that the Petition was filed: May 3, 2010. The Government has cited the case of Renico v. Lett, ___ U.S. ___ No. 09-338 (May 3, 2010) at page 18 of its Brief, but has mischaracterized the majority's decision (by the Chief Justice). Thus, Petitioner needs to reply.

Renico v. Lett, supra, involved federal habeas corpus review of a state court criminal conviction (second degree murder) in a retrial after the first trial ended with a jury deadlock and the state trial court's declaration of a mistrial because of the deadlock.

The Government tries to create the impression that the broad deference to be given to trial court decisions involving mistrial declarations is the same, whether the mistrial results from a jury deadlock or some other reason. A close reading of the majority's opinion in Renico v. Lett, shows the majority was focusing on a

mistrial because of a jury deadlock, not a mistrial because the trial judge was embarrassed by newspaper articles. This Court's majority emphasized that the Supreme Court has never overturned a trial judge's declaration of a mis-trial because the jury was deadlocked.

Moreover, Renico v. Lett , did not involve direct appellate review of the trial's court's mistrial declaration. Rather, the case involved application of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), 28 U.S.C. §2254(d) by a federal habeas corpus court. The majority emphasized this point at the outset of its opinion:

> "It is important at the outset to define the question before us. That question is not whether the trial judge should have declared a mistrial. It is not even whether it was an abuse of discretion for her to have done so — the applicable standard on direct review. The question under AEDPA is instead whether the determination of the Michigan Supreme Court that there was no abuse of discretion was "an unreasonable application of clearly established Federal law." §2254(a)(1).

This Court's majority made it abundantly clear in Renico v. Lett that this Court's majority did not review the Michigan Supreme Court's decision affirming the conviction for correctness. The majority of this Court expressed its position succinctly:

> ". . . Whether or not the Michigan Supreme Court's opinion reinstating Lett's conviction in

> this case was correct, it was clearly not unreasonable...."

The majority in Renico v. Lett, did not express any view that would lead any one to conclude that the majority would affirm the Ninth Circuit in the instant case, which does not involve a deadlocked jury (the classical reason for a mistrial) nor does it involve a collateral challenge to a state Supreme Court's judgment affirming a criminal conviction.

Of course, the Ninth Circuit's decision below would not survive scrutiny by Justice Stevens, who dissented in Renico v. Lett, nor by Justices Breyer and Sotomayor, who joined Justice Stevens.

Relying on this Court's decision in United States v. Jorn, 400 U.S. 470 (1971), which ruled a retrial would violate the Double Jeopardy Clause, the dissent displayed great respect for the Double Jeopardy Clause and the interests it protects. The Government has chosen to ignore the Jorn case because it does not fit with the Government's trivialization of this important constitutional safeguard, which contains no exceptions in the text of the Fifth Amendment.

B. DISCUSSION OF U. S. v. SARTORI

The Government minimizes the importance of the Fourth Circuit's decision in United States v. Sartori, 730 F.2d 973 (4th Cir. 1984) and tries to distinguish it from United States v. Jaramillo, 745 F.2d 1245 (9th Cir. 1984), cert.den. 471 U.S. 1066, 85 L.Ed.2d 499 (1985), but the holdings of the two cases are contradictory. In its Brief filed with the Ninth Circuit below, the Government stated, ". . . Sartori conflicts

with Jaramillo. . . ." (Brief for the United States, 9th Cir. No. 08-50423, page 61, footnote 22). They do conflict. The Fourth Circuit expressly stated,

> "The term "other disability" in Rule 25(a) includes disability by reason of recusal. See Bennett v. United States, 285 F.2d 567, 572 (5th Cir. 1960), cert. Denied, 366, U.S. 911, 81 S.Ct. 1087, 6 L.Ed.2d 236 (1961). . . ."

The Government tries to distinguish Sartori from the instant case, but on the material issue of the application of Rule 25(a) there is no difference. The Government argues no one sought the recusal of the district judge in the Sartori case, but no one sought Judge Kozinski's removal or recusal here. The Government referred to a "submission" that it was considering. Similarly, the Government did not seek the Ninth Circuit's recusal, but simply, "alerted the Court of Appeals . . . ." (See Brief For the United States in Opposition, p. 12, footnote 2).

Sartori and the instant case are the same in all material respects, except here the Ninth Circuit chose to follow Jaramillo, a case far different (indictment of a sitting judge, not an embarrassing article) from the instant case.

It is obvious the lower Courts are confused and need guidance from this Court. The law should be clarified by this Court. The word.

CONCLUSION

For the reasons expressed in the Petition and this Reply, certiorari should be granted. There are no factual disputes. The Government has not disputed any fact asserted by Petitioner, whose Statement of the Case was lifted from the Government's Ninth Circuit Brief. Thus, the Government's argument at page 17 of its Opposition that this Court does not grant "certiorari to review evidence and discuss specific facts" is irrelevant. Petitioner has not asked this Court "to review concurrent findings of fact by two courts below. . . ." (Gov't Opposition, p. 17). Petitioner accepts all factual findings, but disagrees with the conclusions drawn by the District Court and the Ninth Circuit.

Obviously this Court considers the grounds for a mistrial when deciding double jeopardy cases.

The Government tries to separate Jaramillo and Sartori, and link Jaramillo to the instant case, but Jaramillo involved a presiding judge's indictment, which pitted the Government against the judge, not an embarrassing newspaper article. The Government states that Judge Kozinski's prior rulings were tainted, but does not point to any. Moreover, the Government asserts that in Sartori, neither party requested the judge's recusal (Gov't Opposition, p. 20), erroneously implying that one of the parties here (i.e., the Government) requested Judge Kozinski to disqualify himself. However, the Government here made no request to Judge Kozinski. Rather, the Government merely told Judge Kozinski's clerk that it

intended to file a "submission" (without indicating what it would say or request, if anything).[1]

Without waiting for the "submission" and Petitioner's response, Judge Kozinski recused himself and declared a mistrial. At no time did Judge Kozinski declare that his impartiality might reasonably be questioned.

Certiorari should be granted to review the undisputed facts for the purpose of deciding this important double jeopardy issue. It was not decided by Renico v. Lett. The issue is open and there is a circuit split.

No case decided by this Court supports a Double Jeopardy violation as a remedy under 28 U.S.C. §455(a). In Liljeberg v. Health Services Acquisition Corp., 486 U.S. 847, 862 (1988) this Court (Stevens, J.) said section 455 ". . . neither prescribes nor prohibits any particular remedy. . . [and that] . . . Congress has wisely delegated to the judiciary the task of fashioning the remedies. . . ." This Court should fashion the remedy when a defendant in the middle of a criminal jury trial is facing a retrial through no fault of his own because the District Judge unilaterally recuses himself. The remedy should be a replacement judge, especially where the Government does not refer to any prior ruling that it believes was tainted by the self-recused judge.

---

[1] The Government at p.22 (footnote 8) of its Brief filed with the Ninth Circuit described the non existent "submission" as a letter (never produced) that would "inform" Judge Kozinski as to whether he should recuse himself.

Respectfully submitted,

ROGER JON DIAMOND
Counsel of Record
2115 Main Street
Santa Monica, CA 90405
Phone: 310/399-3259
RogDiamond@aol.com

Attorney for Petitioner